Filed 4/15/03 P. v. Cueva CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JULIO CESAR CUEVA,

Defendant and Appellant.

F038329

(Super. Ct. No. CR-42014)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Paul A. Vortmann, Judge.

Linda M. Leavett, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Stephen G. Herndon and John A. Thawley, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Defendant Julio Cesar Cueva was convicted of 11 crimes. He appeals, claiming the trial court erroneously denied his *Miranda* (*Miranda* v. *Arizona* (1966) 384 U.S. 436) motion, insufficient evidence supports his burglary conviction in count 6, no finding was made on his five-year prior serious felony conviction enhancement, there was insufficient evidence to support the finding that defendant had strike priors, it was error for the trial

court to determine the identity issue for the prior convictions, and the trial court had no jurisdiction to increase his sentence once execution had commenced. Except to clarify the sentence for count 1, we affirm the judgment.

FACTS

On May 14, 1998, William and Ruth Benson were working at the business they owned, Benson Travel Agency. A Hispanic man came in the back door of the business, walking by the safe. He inquired regarding a trip to Hawaii. He left without purchasing anything. The next morning when William arrived at work, he found the back door had been kicked or pried open. The safe containing blank airline tickets was missing. (Count 1--commercial burglary--Pen. Code, § 459.[1])

The safe stolen from Benson Travel was later found in a field. The door had been taken off, the contents of the safe had been removed, and the safe was burned.

In May 1998, Elizabeth Pearson Lyon and her husband Bently Lyon were living at Pearson Ranch in a large house surrounded by orange orchards. There were no other houses in the immediate area. The house was equipped with an alarm system. The alarm would sound at the alarm company and also inside the house. The alarm had a delay and would not sound immediately upon entrance to the house. On May 18, 1998, Salud Orozco was working for Pearson Ranch. He heard a noise and saw a Hispanic man come out of the back door of the house.

Tony Marquez, the son-in-law of Elizabeth Pearson Lyon, was the foreperson at Pearson Ranch. He received a call on May 18, 1998, because the alarm had sounded at the house. He arrived at the house approximately five minutes after receiving the call. A door had been forcibly opened. Some sheets had been removed from a bed in the house, but nothing was missing. Tony called his wife, Destiny Marquez, and told her that someone

[1] All future code references are to the Penal Code unless otherwise noted.

had broken into the house. Tony left to look for the culprits. The residents of the home were not present at the time of the break-in. (Count 2--residential burglary--§ 459)

Destiny and one of her employees, Susan Johnson, drove to the ranch. As they neared the ranch, they observed a white Hyundai come out of an orange grove. There were two men in the car, which had Hawaiian license plates (MVB 893). Although Destiny wanted to stop the car because she was sure the men were the burglars, Susan convinced her to drive to the house and speak to law enforcement. Destiny and Susan identified defendant from a photographic lineup; Susan identified defendant at trial as the passenger in the car she had seen leaving the orange grove.

On May 19, 1998, police sergeant Michael Blain saw a white Hyundai with Hawaiian license plates reading MVB 893. Blain stopped the car. Defendant was the driver and the sole occupant. After Sergeant Blain walked up to the car and asked for defendant's driver's license, defendant drove off. A chase ensued. Defendant stopped the car and ran. (Count 4--misdemeanor evading a police officer—Veh. Code, § 2800.1.) Sergeant Blain was unable to locate defendant. The car was searched and blank airline tickets matching those taken in the Benson Travel Agency burglary were found in the car. (Count 3--receiving stolen property--§ 496) The car was registered to Emelda Aleman, the mother of two of defendant's children. Defendant and Aleman had purchased the car while they lived in Hawaii. They were no longer living together, but they did share the car.

On June 22, 1998, officers attempted to stop defendant's car after he failed to signal for a turn. Defendant drove away at a high rate of speed. A chase ensued. Defendant failed to stop at several stop signs and drove over 50 miles per hour past a school where children were playing. The car stopped and defendant fled. (Count 5--felony evading a police officer--Veh. Code, § 2800.2.)

Leslie Noel Cummings met defendant in 1998 or 1999. Although Cummings was living with another man, she would meet defendant at hotels and stay with him. On

April 22, 1999, she loaned defendant her American Express card so he could pay for their room at a hotel. Cummings left on a trip with her live-in boyfriend on April 24, 1999. She gave defendant permission to drive her Nissan Maxima. When she got back from her trip several days later, her car was gone.

Manuel Jalil arrived for work at the Porterville Pallet Company at approximately 8 a.m. on April 7, 1999. A window to the office was broken, the telephone lines were disconnected, and it looked like someone had tried to pry open the safe. Drawers had been opened and papers had been thrown about. Officer Ben Mendoza was dispatched to the Porterville Pallet Company. Officer Mendoza found a latex glove lying on the floor. Officer Mendoza could not find any fingerprints. He did find two types of shoe tracks leading from the street to the broken window and back again. Mendoza sketched the prints and also photographed them. The shoe prints were a "waffle pattern" and a "running W pattern." (Count 6--commercial burglary--§ 459.)

At approximately 9 a.m. on April 7, 1999, California Highway Patrol Officer Bobby Ford stopped a white Hyundai going southbound on state route 65 for speeding. Defendant was the driver of the vehicle, and the car had a male passenger. The car had an Arizona rear license plate and no front license plate. Officer Ford determined that the Arizona license plate was the wrong license plate for the vehicle. Defendant was unable to provide a driver's license, registration, or proof of insurance. Defendant told the officer his name was Joshua Ortega. In the trunk of the car defendant showed the officer a Hawaiian license plate, No. MBV 893. Officer Ford later learned that defendant had given a false name.

On April 26, 1999, Terry Schuler left his residence at 8 a.m. and returned at approximately 3 p.m. in the afternoon. When he returned, he saw a small white car parked near his house in an orange grove. Schuler approached his house and saw that his shop door was open. He looked in the window and saw that his office had been ransacked. He returned to his truck and got his gun and a cellular telephone. He called law enforcement

and entered his house, finding that his back door hinge had been broken off. He found cutting torches in the house near the room he used as a safe. There was a crowbar in the house that did not belong to him. He was missing cans and a water jug that contained change, as well as a camera, Nintendo game, and business checks. Schuler walked outside and noticed that the car was gone. He continued to talk to the 911 operator, telling her the only two roads that left his area. While still talking to the operator, he heard that a car had been stopped. Shoeprints with a waffle pattern and a running W pattern were found in and near the house. (Count 7--residential burglary--§ 459; and count 8--receiving stolen property--§ 496.)

Deputy Sheriff Michael Giefer was responding to the call from the Schuler residence when he spotted a vehicle that matched the description of the car involved in the Schuler burglary. Giefer stopped the vehicle. Defendant was driving and there was one passenger in the car. Giefer asked defendant for his identification, registration and proof of insurance. Defendant did not have it. Geifer returned to his patrol car and radioed his location; he then pulled out his gun to initiate a felony stop. Defendant drove off. A high speed chase ensued and eventually the car stopped. Defendant and his passenger fled and were not captured. (Counts 9 & 10--felony and misdemeanor evading a police officer—Veh. Code, §§ 2800.2 and 2800.1.)

After defendant and his passenger fled, Giefer found numerous items in the car that had been stolen from the Schuler residence. (Count 8--receiving stolen property--§ 496.) The car belonged to Noel Cummings.

In the early morning of April 28, 1999, Jorge Cortez arrived for work at the Cortez Market. When he entered the store, he heard the alarm on the emergency exit going off. This was unusual. The market had been burglarized and over $50,000 was missing. A new crowbar with a label from Wal Mart and a screwdriver, not belonging to the store, were found inside the store, as well as a latex glove and a portion of a latex glove. The telephones had been disconnected and a camera had been turned so the perpetrators could

not be seen. Someone had attempted to open the safe but was unsuccessful. Shoeprints were found, including a shoeprint on a bar of soap in a sink in the bathroom. An entrance to the attic was above the sink. Shoeprints were also found outside. The shoeprints had a waffle pattern. (Count 11--commercial burglary--§ 459.)

On April 27, 1999, a crowbar was purchased at Wal Mart with an American Express card in the name of Noel Cummings. On April 24, 1999, a man and a woman purchased two 2-way radios from Big 5 Sporting Goods. They used a credit card to make their purchases. The radios and wrappers from the radio were found in Cummings's car abandoned by defendant after he was chased by police. A crowbar was purchased at Wally's Hardware in Porterville on April 26, 1999, with an American Express card in the name of Cummings. The crowbar found at the Schuler house was the same type as that purchased at Wally's Hardware.

Cummings's car contained property taken from the Schuler burglary, defendant's pager, a package of latex gloves, Big 5 radios, paperwork for defendant, a traffic ticket issued to Joshua Ortega, and wrapping from items, including items from Wally's Hardware and Big 5 Sporting Goods.

Sergeant Wayne Davis was looking for defendant on April 30, 1999. He pulled over a car that defendant was riding in as a passenger. Defendant ran but was apprehended and arrested. Later that day at the jail, Deputy Sheriff Mike Flanagan contacted defendant to try and get a statement from him. Defendant said he left Arizona on April 23, 1999, driving Noel Cummings's car. He purchased radios at Big 5 Sporting Goods and tools at Wally's Hardware using Cummings's credit card. Flanagan asked defendant about the Schuler burglary. Defendant said, "I won't say I was there. What do you want me to tell you? You tell me what you're going to do for me." Flanagan terminated the interview because he was not in a position to make a deal with defendant.

The shoeprints from the Porterville Pallet burglary, the Schuler burglary, and the Cortez Market burglary were consistent in size, shape, and design.

Defense

Defendant testified on his own behalf. He denied committing any of the burglaries but admitted to the charges of evading a police officer.

Daniel Sanchez testified that he was acquainted with defendant. On April 26, 1999, Daniel and Domingo Santos committed a burglary at the Schuler residence. Daniel drove off, leaving Domingo in the orange orchard. Daniel went to defendant's sister's house. Defendant got in the car and drove off with Daniel. When the two got pulled over, they ran. Defendant's sister testified that defendant was at her house for a barbeque when Daniel Sanchez arrived in a white car. Defendant departed with Sanchez.

DISCUSSION

I. Implied Miranda Waiver

Defendant made a motion to suppress his statements made to Officer Flanagan. He claimed that he did not waive his *Miranda* rights prior to giving his statement. A hearing outside of the presence of the jury was held.

Officer Flanagan testified at the hearing that defendant was in custody at the jail when he was brought into the interview room to be questioned by Officer Flanagan on April 30, 1999. Officer Flanagan turned on a tape recorder. He told defendant he was investigating a burglary and he then read defendant his *Miranda* rights as follows: "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish. You can decide at any time to exercise these rights, not answer any questions or make any statements."

When Officer Flanagan finished the above admonishment, defendant stated that he did not want to talk with a recorder on. Flanagan turned the recorder off and Officer Flanagan began questioning defendant about his activities. Flanagan did not ask defendant if he waived his rights and defendant did not explicitly state that he waived his rights.

Defendant appeared to understand his rights and did not ask to have his rights explained. He did not express a desire to not talk nor did he express a desire to have an attorney appointed or present.

Evidence was presented concerning defendant's prior experiences with police interrogations in Tulare County. On July 25, 1991, defendant was advised of his rights; he stated he did not want to talk. On October 22, 1991, defendant was advised of his rights and declined to speak to officers; he refused to sign a written waiver of his rights.

Defendant testified that he told Flanagan on April 30, 1999, he did not want to talk to him and to turn the recorder off. On cross-examination, it was established that defendant had waived his rights in Phoenix, Arizona, and he was cooperating with law enforcement there in exchange for the dismissal of charges against him.

The trial court found that there was an implied waiver and denied defendant's motion to suppress the statements he made to Flanagan.

Defendant claims the trial court erred when it admitted his statements to Flanagan. First, defendant contends he affirmatively invoked his *Miranda* rights and the interview should have ceased. Next, he argues that his desire to have the tape recorder turned off presented his intention to not discuss his case. Even if his request to have the tape recorder turned off is considered ambiguous, defendant asserts that his request should have been clarified further before questioning could continue.

"The prosecution had to prove by a preponderance of evidence that defendant knowingly and voluntarily waived his *Miranda* rights. [Citations.] A valid waiver may be express or implied. [Citation.] Although it may not be inferred 'simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained' [citation], it may be inferred where 'the actions and words of the person interrogated' clearly imply it. [Citation.]

"In determining whether a defendant waived his rights, the court must consider 'the totality of the circumstances surrounding the interrogation.' [Citation.] In *Moran v.*

Burbine (1986) 475 U.S. 412 …, the court identified two distinct components of the inquiry: 'First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. [Citations.] [¶] ... [¶] ... Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.' [Citation.]

"On appeal, we accept the trial court's resolution of disputed facts and inferences, and its evaluation of credibility, if supported by substantial evidence. [Citation.]" (*People v. Cortes* (1999) 71 Cal.App.4th 62, 69-70.)

Defendant has not alleged that his relinquishment of his *Miranda* rights was the product of intimidation, coercion, deception, or any other method negating the voluntary nature of his choice. We must determine if defendant's statement was made with a full awareness of the right being abandoned and the consequences of that decision.

In *People v. Johnson* (1993) 6 Cal.4th 1, the defendant was brought in for an interview. He was told the purpose of the interview, and the officer brought out a tape recorder. Defendant then stated, "No tape recorder. I don't want to incriminate myself." (*Id.* at p. 25.) The recorder was not used. The defendant was then read his *Miranda* rights. He confirmed that he understood those rights and wished to talk with the officers. The Supreme Court found that defendant's statement was admissible. It distinguished other cases where the defendants indicated they did not want the tape recorder used because in those cases the defendants' "refusal to permit a recording was accompanied by other facts

disclosing [their] clear intent to speak *privately* and in confidence with the officers." (*Id*. at p. 26.)

Although the defendant in *Johnson* stated he did not want to incriminate himself in conjunction with his "no tape recorder" remark, the court found that any ambiguity was cleared up when defendant was given his *Miranda* rights and his waiver was obtained. (*People v. Johnson*, *supra*, 6 Cal.4th at pp. 26-27.)

Unlike the defendant in *Johnson*, the statement by defendant here did not evidence any belief that defendant did not want to talk to Flanagan; defendant stated he wanted to talk but not with the tape recorder on. Additionally, defendant said nothing that would indicate that he wanted to speak privately and in confidence with Flanagan. Although Flanagan failed to obtain an express waiver from defendant that he understood his rights and agreed to waive them, the trial court found that defendant's prior criminal experiences involving *Miranda* satisfied the requirement that defendant had full awareness of the nature of the right and the consequences that resulted from abandoning the right. The trial court may properly consider the defendant's sophistication or past experience with law enforcement. (See *People v. Lewis* (2001) 26 Cal.4th 334, 386.)

It was for the trial court to determine if defendant understood his rights and waived them. The court found that under the totality of the circumstances defendant gave an implied waiver. The trial court's conclusion was reasonable. The trial court properly admitted defendant's remarks to Flanagan.

II. Substantial Evidence--Porterville Pallet Burglary

On appeal "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence--that is, evidence which is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People* v. *Johnson* (1980) 26 Cal.3d 557, 578.) Substantial evidence includes circumstantial evidence and the

reasonable inferences flowing therefrom. (*In re James D.* (1981) 116 Cal.App.3d 810, 813.)

Defendant asserts that the evidence was not sufficient to prove the Porterville Pallet burglary. In particular, he claims he could not be found guilty based on nondistinctive similarities to his other charged burglaries.

"Defendant's hurdle to secure a reversal is just as high even when the prosecution's case depends on circumstantial evidence." (*People v. Akins* (1997) 56 Cal.App.4th 331, 336.) Viewing the record in the light most favorable to the prosecution, there is sufficient circumstantial evidence to tie defendant to the Porterville Pallet burglary. Defendant was clearly linked to the Schuler burglary because he was stopped within minutes after the burglary with the stolen property in the car and was linked to the purchase of the crowbar found at the Schuler house that had been purchased using the credit card given to defendant by Noel Cummings. Defendant was similarly linked to the Cortez Market burglary based, again, on a different crowbar purchase. In addition, the Porterville Pallet burglary, the Schuler burglary, and the Cortez Market burglary occurred within a brief span of time in the Porterville area. The most significant piece of evidence tying the three cases together was the shoe prints. Although they could not be identified as exactly the same shoe because there was no distinct identifying characteristic (such as some sort of imperfection in the pattern), they were consistent in size, shape, and design. In addition, latex gloves were left at the scene of Porterville Pallet and Cortez Market. Gloves were also recovered from the car defendant was driving immediately after the Schuler burglary. In each of the burglaries, the burglars parked away from the building and walked to and from the car to the place they burgled. The only item taken from Porterville Pallet was some candy, there were candy wrappers left at the Schuler house. Defendant was stopped the morning of the Porterville Pallet burglary driving a car with incorrect license plates, evidencing a consciousness of guilt. Viewing this circumstantial evidence as a whole, the jury could reasonably have found defendant guilty of the Porterville Pallet burglary, just as

he participated in the Schuler burglary and the Cortez Market burglary. Substantial evidence supports defendant's conviction of burglary of the Porterville Pallet Company.

III. Failure to Make Findings of Section 667, Subdivision (a) Enhancements

It was alleged in each count of the information that defendant suffered six prior convictions for first degree residential burglary pursuant to the three strikes law. These same convictions were alleged as prior serious felony enhancements pursuant to section 667, subdivision (a). The jury made findings that defendant had been convicted of the prior first degree burglaries for the purposes of the three strikes law. The jury was not given verdict forms for the section 667, subdivision (a) five-year serious felony enhancements.

Defendant asserts the five-year sentence enhancement imposed pursuant to section 667, subdivision (a) must be reversed because no finding was made by the court or the jury on this allegation.

In *People v. Marshall* (1996) 13 Cal.4th 799 the defendant was found guilty of more than one murder; he was also charged with a multiple-murder special circumstance. The law provided that there must be a jury finding on a multiple-murder special circumstance allegation. The trial court did not submit the multiple-murder allegation issue to the jury because if the jury found the defendant guilty of two counts of murder and at least one of them was first degree murder, then the multiple-murder special circumstance has been found beyond a reasonable doubt and no further finding was necessary. The California Supreme Court found this was error, but concluded that the error was harmless. First, the court found that the error was not a structural error. "The error was not so pervasive as to affect the framework within which the trial proceeded. Rather, it is susceptible to quantitative assessment because the record compels the conclusion the error had no effect on the outcome of the trial and was …harmless beyond a reasonable doubt." (*Id.* at pp. 851-852.) Next, the court found no prejudice. "[T]he jury's verdict of guilt on three counts of murder in the first degree necessarily established the

factual predicate of the special circumstance, that defendant was convicted in this proceeding of more than one count of murder in the first or second degree." (*Id*. at p. 852.)

An analogous situation was found in *People v. Jones* (1997) 58 Cal.App.4th 693 involving the multiple-victim circumstance for certain sexual offenses that calls for increased punishment. Although the jury returned verdicts finding the defendant guilty of each alleged sexual offense and there was more than one victim, the jury did not make a separate finding that the defendant had been convicted in the present case of committing a specified sexual offense against more than one victim. "[E]ven if the trial court had not only failed to instruct the jury on the multiple victim circumstances, but had also failed to give the jury any verdict forms for the multiple victim circumstances, the error would be harmless" once the jury returned it's verdict finding him guilty of the requisite underlying substantive sexual offenses. (*Id*. at p. 712.)

In *People v. Eppinger* (1895) 109 Cal. 294, "the defendant was charged with one count of uttering a fictitious check. In connection with this charge, it was alleged that the defendant had suffered a prior conviction for petty larceny. Although the jury returned a verdict of 'guilty as charged,' [the California Supreme] Court determined that the defendant could not receive an enhanced sentence for the substantive offense because of the prior conviction, on the ground that there had been no separate jury finding on that allegation." (*People v. Paul* (1998) 18 Cal.4th 698, 708-709.)

Unlike the defendant in *Eppinger,* defendant was not sentenced for the serious prior felony enhancement based on a "guilty as charged" verdict nor was there an absence of a separate finding on the question of whether defendant suffered the prior convictions from 1991. Rather, the jury returned a separate verdict form finding the prior conviction allegations to be true; nothing more was required to support the subdivision (a) enhancements.

"[T]he jury's function [is] to find whether the facts necessary for conviction [have] been proven, by assessment of the evidence admitted at trial in light of the court's

instructions defining the types and quanta of facts necessary for conviction. The verdict, culminating this process, [is] the jury's statement whether it [has] or [has] not found those facts." (*People v. Cory* (1984) 157 Cal.App.3d 1094, 1102.) The jury function to determine if defendant suffered the prior burglary convictions in 1991 was satisfied by the jury's verdict finding so in the context of the strike allegations. No further findings were necessary. Error in not submitting verdict forms to the jury was harmless.

IV. Sufficient Evidence that Defendant was Convicted of Priors

Sergeant Brian Johnson testified that he compared the fingerprints obtained when defendant was booked on October 22, 1991, for the offenses that resulted in his prior convictions and those obtained on April 30, 1999, when defendant was arrested for the crimes that led up to the current convictions. The fingerprints matched. Sergeant Johnson had to use booking information because defendant did not go to prison as a result of the 1991 charges.[2] Johnson testified there was no picture with the booking information, but the information was regarding Julio Cueva. The officer admitted that "Cueva" and "Julio" are both fairly common names. The date of birth on the booking information on these two occasions was June 26, 1972. Johnson testified that he frequently comes across people who share the same birthdate and name.

Joanne Erwin, the custodian of records for the Tulare County Sheriff's office, testified regarding the booking records of October 22, 1991, and April 30, 1999, for Julio Cueva. On the 1991 booking information it stated that the individual was "Julio Cesar Cueva," born on June 26, 1972. His physical description was "five-eight, 180, black hair, looks like green eyes." The booking sheet was completed with fingerprints. There was a photograph with the October 22, 1991, booking information.

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[2] He was sent to California Rehabilitation Center (CRC) as a result of the 1991 convictions. He then absconded while on parole supervision from CRC.

The April 30, 1999, booking records were for "Cesar Julio Cueva," with a date of birth of June 26, 1972. The physical description was "five-nine, 190, brown eyes and black hair. Accompanying this information were the fingerprints. The booking card listed numerous counts.

Defendant testified that in the 1990's he was represented by the public defender's office in case No. 31560, involving six burglaries. Defendant testified that he had not sustained the burglary convictions because he had not been sentenced. On cross-examination defendant was shown the transcript from his sentencing hearing in 1991 (exhibit 181) and testified that his interpretation of what occurred was that his sentence was suspended and he was sent to CRC.

Defendant argued to the trial court that his priors could not be used as strikes because he was sent to CRC. The court rejected this argument.[3] The court asked the parties if they had any argument on the question of the identity of the defendant as the person who suffered the priors. Neither party had any comments. The trial court found that the documents established beyond a reasonable doubt that defendant is the individual referred to in the documents.

Defendant argues there was insufficient evidence to show that he was convicted of the strike priors. Defendant makes this claim based on the facts that descriptions of the eye colors on the two booking forms did not match, there were no photographs, and the information was made solely on booking information. Defendant also points out that Johnson testified that "Cueva" was a common name and it was not unusual for two people to have the same name and birthdate.

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[3] A prior conviction is a strike even when sentence has been suspended and the defendant is sent to CRC. (§ 667, subd. (d)(1)(D).)

As previously stated, on appeal "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence--that is, evidence which is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People* v. *Johnson,* supra, 26 Cal.3d at p. 578.) Substantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom. (*In re James D.,* supra, 116 Cal.App.3d at p. 813.)

Although defendant argues that the fingerprint evidence is lacking because it came from booking information, we fail to see how booking fingerprints are different from fingerprints taken at other times. The other discrepancies in identifying information were minor. Contrary to defendant's assertion, there was a photograph with the 1991 booking information, as testified to by Erwin. "The California Supreme Court has repeatedly emphasized that fingerprints are the strongest evidence of identity and ordinarily are sufficient by themselves to identify the perpetrator of the crime." (*People v. Figueroa* (1992) 2 Cal.App.4th 1584, 1588.) In addition, defendant did not deny that he was the individual who was the subject of the 1991 sentencing hearing and acknowledged facts pertaining to him contained in the reporter's transcript of that hearing. The trial court's finding that defendant was the individual who suffered the convictions from 1991 was supported by substantial evidence.

V. Court's Determination of Defendant's Identity for Strikes

Defendant contends that due process requires a jury trial on the fact of identification of the defendant in all prior conviction matters. In the alternative, he asserts that because identification was not clear from the evidence the question should have been left to the jury and any error was not harmless.

In *People v. Epps* (2001) 25 Cal.4th 19 the California Supreme Court held that a defendant has only a statutory right to a jury trial on prior conviction allegations and the denial of that right does not implicate the federal Constitution. The court went on to hold

that because an error in failing to hold a jury trial on a prior conviction is purely one of state law, it is subject to a test of harmless error requiring reversal only upon a finding of a reasonable probability of a result more favorable to the defendant in the absence of the error. (*Id*. at pp. 29-30.) Defendant claims that *Epps* did not explicitly decide whether the fact of identity falls within the prior conviction exception of a jury trial and thus this court is not bound by *Epps* and may decide the issue. The *Epps* court held that the right, if any, to a jury trial of "prior conviction allegations" derives from the statutes and not from the state or federal Constitution. We fail to see how identity is not part and parcel of prior conviction allegations. Defendant's argument fails.

VI. Increase of Defendant's Sentence

Defendant was sentenced on June 7, 2001. The trial court imposed a sentence of 25 years to life on count 2, the Pearson residential burglary, with an additional five-year enhancement for a prior serious felony conviction. The trial court exercised its discretion and struck the strikes for the remaining counts. On count 1, the Benson Travel commercial burglary, the reporter's transcript reflects the trial court stated, "In Count 1, defendant is sentenced to one-third the mid term of two years and eight months, said term to run consecutive to Count 2."

The minutes of this hearing state that count 1 is a first degree burglary and the sentence is "1 yr 4 months (1/3 mid term)." The abstract of judgment lists count 1 as burglary with no designation of degree but reflects a consecutive sentence for one-third the midterm, 16 months.

On October 22, 2001, the trial court filed a modification order which reads as follows: "Defendant was convicted in Count 01 of violation of Penal Code section 459, second degree burglary. The Minute Order of June 7, 2001 should be corrected to reflect conviction of second, not first, degree burglary. [¶] As to Count 01, the Order of Sentence should be amended to reflect the midterm of two years to run consecutive to the term imposed in Count 02."

Defendant argues that the trial court had no jurisdiction to increase his sentence once execution had commenced. Defendant does not object to the clerical correction changing the degree of the burglary to the correct designation of second degree burglary. Defendant asks that the modification be reversed and the prior sentence imposed or a hearing ordered on remand.

Respondent agrees that this court may correct the "clerical error" listing the wrong degree for count 1. Respondent also agrees that if the issue is cognizable on appeal, in the absence of the modification order, the court may not increase defendant's sentence in his absence. Respondent suggests that we correct the clerical error and reinstate the 16-month sentence.

We believe that both parties are incorrect in their assessment of what occurred here. The trial court did not state the degree of count 1 when it originally pronounced sentence. It did state that it was sentencing defendant to one-third the "midterm of two years and eight months." The mid-term for first degree burglary is four years; the midterm of second degree burglary is two years. One-third the midterm of two years is eight months. We presume the trial court either misspoke or the reporter erred in the transcription regarding this sentence. There is no doubt the trial court intended to impose one-third the midterm of two years for Count 1. This correct term is eight months.

We thus interpret the order correcting sentence dated October 22, 2001, to simply state that count 1 is a second degree burglary and the midterm for second degree burglary is two years. The sentence actually imposed should be clarified to read eight months, one-third the midterm of two years.

DISPOSITION

The trial court is ordered to correct the minutes and the abstract of judgment to reflect that count 1 is a second degree burglary and the sentence imposed is one-third of two years, an eight-month consecutive term. We further direct sending of the corrected abstract to the appropriate authorities. In all other respects, the judgment is affirmed.

_____
VARTABEDIAN, J.

WE CONCUR:

_____
DIBIASO, Acting P. J.

_____
BUCKLEY, J.